

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE PETITION OF)	
DELMARVA POWER & LIGHT COMPANY FOR)	
REVIEW AND APPROVAL OF ITS PROPOSAL TO)	PSC DOCKET NO. 19-0110
CONSTRUCT A SATELLITE NATURAL GAS)	
STORAGE FACILITY)	
(Filed February 22, 2019))	

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

June 10, 2019

Glenn C. Kenton
Hearing Examiner

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FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

Glenn Kenton, duly appointed Hearing Examiner in this Docket pursuant to 26 *Del. C.* §502 and 29 *Del. C.* ch. 101 and by Commission Order No. 9362 dated April 2, 2019, reports to the Commission as follows:

I. APPEARANCES

On behalf of the Applicant Delmarva Power and Light Company
("Delmarva", "DPL" or "the Company"):

By: TODD L. GOODMAN, ESQ.
ASSISTANT GENERAL COUNSEL
DELMARVA POWER & LIGHT COMPANY

On behalf of the Public Service Commission Staff ("Staff" or
"Commission Staff"):

By: THOMAS D. WALSH, ESQ.
DEPUTY ATTORNEY GENERAL

On behalf of the Division of the Public Advocate ("DPA" or "Public
Advocate"):

By: REGINA A. IORII, ESQ.
DEPUTY ATTORNEY GENERAL

On behalf of Chesapeake Utilities Corporation ("Chesapeake"):

By: WILLIAM F. O'BRIEN, ESQ.
ASSOCIATE GENERAL COUNSEL
CHESAPEAKE UTILITIES CORPORATION

II. EXECUTIVE SUMMARY

1. On February 22, 2019, Delmarva Power & Light Company (“Delmarva”) filed a petition (“Petition”) with the Public Service Commission of the State of Delaware (“Commission” or “PSC”) seeking review and approval of its proposal to construct a satellite liquefied natural gas storage facility (“LNG Storage Facility”) in the southern region of its service territory and to recover its projected costs of \$ 275,000,000 via either inclusion in its annual GCR (Gas Cost Recovery) fuel adjustment charge or via the creation of a regulatory asset for such costs.

2. The Division of Public Advocate (“DPA”) and Staff of the Commission (“Staff”) promptly filed a Joint Objection (“Objection”)¹ to be considered as a Motion for Summary Judgment, arguing that (i) Delmarva did not need Commission approval to construct the LNG Storage facility and, (ii) that Commission was without authority to grant Delmarva’s request to seek recovery of the costs of the LNG Storage Facility via either including its costs in its annual GCR adjustment or via the creation of a regulatory asset for such costs.

3. As Hearing Examiner, I agreed with the DPA/Staff argument that (i) Delmarva does not need Commission approval to construct the proposed LNG Storage Facility (Delmarva conceded this point) and (ii) there is insufficient authority for Delmarva to include the costs of the LNG Storage Facility in its annual GCR adjustment. But I disagreed with the DPA/Staff argument that the Commission does not have the authority to grant Delmarva a regulatory asset should it so decide. The Commission has the authority should it so choose.

4. I, therefore, recommended the Commission grant the DPA/Staff Motion for Summary Judgment thus denying Delmarva’s Petition to include the costs of the LNG Gas Storage Facility in its annual GCR adjustment but I recommended denying its Motion for Summary

¹ DPA/Staff Joint Objection (“Objection”) filed April 30, 2019.

Judgment with respect to its argument that the Commission does not have the authority to grant to Delmarva a regulatory asset in the case should it so decide.

5. Because the parties have agreed that Delmarva does not need Commission approval to construct the LNG Storage Facility, I first recommend that paragraph (1.) of the Commission's Opening Order 9362 prohibiting Delmarva from entering into construction contracts or ordering plant components related to its Petition be lifted.

III. BACKGROUND

6. On February 22, 2019, Delmarva filed the above-captioned Petition with the Commission seeking review and approval of its proposal to construct a satellite liquefied natural gas storage facility ("LNG Storage Facility") in the southern region of its natural gas service territory and to seek recovery of its costs through one of two alternative: (i) inclusion in Delmarva's annual GCR adjustment or, (ii) the creation of a regulatory asset.

7. On April 3, 2019, this Docket was created by Order No. 9362 of the Commission to consider Delmarva's Petition. In Order No. 9362, I was designated as the Hearing Examiner for this matter pursuant to the provisions of 26 *Del. C.* § 502 and 29 *Del. C.* Ch. 101 to schedule and conduct, upon due notice, such public comment sessions and evidentiary hearings, as may be necessary, to have a full and complete record concerning the justness and reasonableness of the Petition.

8. On April 30, 2019, the DPA and Staff filed an Objection² to the Petition.

9. By email to the parties dated May 7, 2019, I advised the parties that I did not see an "Objection" as a filing pursuant to PSC Rule 1.7.1 and asked them to confer and arrive at an agreement as to how to proceed in this Docket?

² Objection, *Op. Cit.*

10. On May 17, 2019, I received a letter from counsel to Delmarva advising me that Delmarva and counsel to DPA and Staff had agreed on a recommended procedure (“Agreed Procedures”) for resolving the Objection. In the Agreed Procedures, the parties recommended that:

(i) The Objection be treated as a “Motion to Dismiss/for Summary Judgment.”

(ii) Delmarva stated that it does not assert the Commission’s approval is a prerequisite to constructing the gas storage facility.

(iii) Delmarva will file a response to the Objection on May 30, 2019.

(iv) No further testimony, discovery, evidentiary hearing or other record is required for me to make a recommendation to the Commission – and for the Commission to make a determination in this Docket.

(v) As Hearing Examiner, I am to consider the Objection and Delmarva’s response and then issue a recommendation to the Commission by June 28, 2018 as to whether the Commission should (a) approve a regulatory asset, (b) approve Delmarva’s proposed alternative method of recovery, or (c) approve neither (a) nor (b).

(vi) The parties will file any exceptions to my recommendations as provided in the PSC Rules.

(vii) The Commission will then deliberate on my recommendations.

11. Delmarva’s letter containing the Agreed Procedures was duly filed in *Delawarefile*.

12. Because of my uncertainty as to just what information I was to consider in reaching my Findings and Recommendations, I initially requested additional information from

Delmarva in Order 9388³. DPA and Staff objected. After further consultations with the parties, it was agreed that DPA and Staff were arguing that the Commission had no authority to approve either alternative being proposed by Delmarva: either, (i) creating a regulatory asset for the proposed \$275,000,000 cost of the LNG Storage Facility, nor (ii) including its cost in the annual GCR adjustment. As a result, all parties agreed that additional information from Delmarva was not needed as the issue was solely a legal one and that I could make a decision based solely on the filed record. Accordingly, I issued Revised Order No. 9388⁴ removing the request for additional information.

13. On May 30, 2019, per the Agreed Procedures, Delmarva filed its Response to the Objection.⁵

IV. THE PARTIES' POSITIONS

14. **DPA/Staff** – DPA/Staff argue (1) that Delmarva does not need Commission approval to construct the LNG Storage facility and (2) that the Commission is without legal authority to grant either of Delmarva's requested recovery alternatives: either (i) recovery thru the annual GCR adjustment charge or (ii) potential recovery through the creation of a regulatory asset.⁶

15. With respect to the issue of Delmarva's need for Commission approval to construct the LNG Storage Facility, Delmarva in its Response to DPA/Staff Motion for Summary Judgment concedes the point.⁷ It agrees that it could construct the LNG Storage Facility without Commission pre-approval. Rather Delmarva argues that the Commission could choose to approve

³ Order No. 9388.

⁴ Revised Order No. 9388.

⁵ Delmarva Response ("Delm. Resp.") filed May 30, 2019.

⁶ Objection, *Op. Cit.*, generally.

⁷ Delm. Resp., *Op. Cit.* at 5

the LNG Storage Facility and that such approval is consistent with past Commission practices, particularly for significant investments.⁸ Delmarva cites several examples of Commission pre-approval of significant investments including Commission approval in 2008 of long term contracts for RECs, Commission approval in 2010 of a long term contract for Solar RECs in Dover, and Commission approval in 2017 for Delmarva to invest in electric vehicle charging station infrastructure.⁹

16. Next, in their Objection DPA/Staff argue that the Commission is without authority to approve Delmarva's request to recover the estimated \$ 275,000,000 cost of the LNG Storage Facility through its annual GCR charge "because the fuel adjustment clause only permits the recovery of *fuel costs*, not the cost of plant that holds (or does anything else with) fuel."¹⁰ In support of its position DPA/Staff cite the language in 26 *Del. C.* § 303(b) (which creates the annual GCR) which on its face does not include language that permits the recovery of plant, "even if it is fuel-related."¹¹ In addition, DPA/Staff argue that Delmarva's tariff (in Fifth Revised Leaf No. 32, Section XX) which defines what constitutes "total gas costs" uses the words "shall consist of" and does not include the plant.¹²

17. Finally, in their Objection DPA/Staff argue that the Commission is also without authority to approve a regulatory asset for Delmarva's construction of its proposed LNG Storage Facility. In support of its position, DPA/Staff argues that Delmarva could avail itself of the traditional recovery method of filing for recovery when the LNG Storage Facility is placed in

⁸ *Id.* at 7.

⁹ *Id.* at 7-8.

¹⁰ Objection, *Op. Cit.* at 3.

¹¹ *Id.* at 3.

¹² *Id.* at 4-6.

service and becomes “used and useful”¹³ and that the lag time in such recovery is built into the utility’s rate of return.¹⁴

18. **Delmarva** – As stated above (para. 15), Delmarva has agreed that it has the authority to construct the LNG Storage Facility without approval of the Commission and has also agreed that, upon the LNG Storage Facility being placed into service and being “used and useful,” Delmarva could seek recovery of its costs via a normal rate filing.

19. Nevertheless, Delmarva has applied for a more rapid recovery of the costs of the LNG Storage Facility via either having the Commission approve including its costs in the normal GCR Recovery process or approve creating a regulatory asset for its costs. Delmarva argues that either of these alternatives is within the discretion of the Commission and that the Commission has the legal authority to approve either.¹⁵

20. With respect to the possible recovery of the costs of the LNG Storage Facility through the annual GCR, Delmarva first argues that the statutory language could and should be read broadly to include the costs of the LNG Storage Facility. It cites as examples the past inclusion of costs recovered via the annual GCR adjustment charge such as (1) peak supply service contracts, (2) gas storage service costs and (3) pressure support contract costs.¹⁶ Delmarva further argues that, with respect to its tariff not providing for the inclusion of the costs of the LNG Storage Facility in its annual GCR, the Commission could adjust the “minor” tariff language that is required, pointing out that the adjustment, if approved, would not go into effect until the 2021 GCR Docket at the earliest.¹⁷

¹³ See definition of “Rate Base,” 26 Del. C. § 102(3).

¹⁴ Objection, *Op. Cit* at 7.

¹⁵ Delm. Resp., *Op. Cit.* at 23.

¹⁶ *Id.* at 14.

¹⁷ *Id.* at 15.

21. With respect to the authority of the Commission to approve Delmarva's alternative proposed recovery mechanism via the creation of a regulatory asset, Delmarva argues that the use of regulatory assets "have long been used by the Commission to mitigate regulatory lag for investments of this nature."¹⁸ It cites the Commission recent order that provides that the creation of a regulatory asset is appropriate to give the utility the "possibility to be made whole if ... it does something which is in the public interest."¹⁹ Delmarva argues that *Artesian* clarified the standard for the creation by the Commission of a regulatory asset in order to "incentivize" the utility to make investments in the public interest. Delmarva cites several past examples (including *Artesian*) wherein the Commission has approved a regulatory asset for a utility.²⁰ It argues that the granting to Delmarva of a regulatory asset for the construction of the LNG Storage Facility is in the public interest as it is projected to save Delmarva's ratepayer's substantial costs over the projected life of the facility.²¹ Delmarva also points out that the granting of a regulatory asset at this time is no guarantee that Delmarva will collect the deferred costs in its next rate case. It cites *Artesian* for the principle that, consistent with FASB 71, if the Commission establishes a regulatory asset now, the merits of recovery are not decided at this time but would decide, at the earliest, in the next rate proceeding, or maybe later depending upon the status of construction.²²

V. DISCUSSION

22. I have considered carefully both the Objection and Delmarva's Response.

This is not an unimportant issue as the projected cost of the LNG Storage Facility is

¹⁸ *Id.* at 16.

¹⁹ *In re: Artesian Water Co. ("Artesian")*, P.S.C. Docket No. 16-1001, Order No. 9125 (Oct. 2017).

²⁰ Delm. Resp., *Op. Cit.* at 20-21.

²¹ *Id.* at 18.

²² *Id.* at 20.

estimated to be \$ 275,000,000 over 30 years – a cost which if justified will eventually be borne by Delmarva’s ratepayers.

23. The issue before me is the Motion for Summary Judgment filed by DPA/Staff. This issue(s) is/are not the substantive positions of the parties in this docket (even though the parties in their respective filings go to great lengths to argue their respective substantive positions).

24. The standard for granting a Motion for Summary Judgment is well-established in Delaware. Superior Court Rule 56(e) provides that the motion should be granted only where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.²³ Delaware case law provides that the presiding officer must view the evidence in the light most favorable to the non-movant and give the non-movant the benefit of all rational favorable inferences.²⁴

25. In this matter, all parties have agreed that there is no genuine issue as to any material fact. I agree. The question, therefore, is whether DPA/Staff are entitled to judgment as a matter of law?

26. The question of whether DPA/Staff are entitled to judgment as a matter of law comes down to two (2) issues, as follows:

A. Does the Commission have the authority to permit Delmarva to include the projected costs of the LNG Storage Facility in its annual GCR Adjustment?

27. DPA and Staff argue that it does not. They point out in their joint Objection that the definition of “fuel” in the statute creating the annual GCR adjustment charts should not be

²³ Super Ct. Civ. R. 56(e).

²⁴ *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993); *Baylis v. Wilmington Medical Center, Inc.*, 477 A.2d 1051, 1057 (Del. 1984).

read expansively. Fuel is fuel. Fuel is not plant. Delmarva argues for a more expansive reading of “fuel” in the statute. As to Staff/DPA’s reliance on the fairly narrow definition of fuel costs in Delmarva’s tariff leaf, Delmarva also argues the Commission may, in this docket, make a “minor amendment” to the tariff to provide for the inclusion of the costs of the LNG Storage Facility in the GCR adjustment.

28. I am persuaded that Delmarva’s reading of the statute and the Commission’s ability to amend the tariff in this docket, while creative, is a stretch, particularly at this time. As I mentioned above, this is a \$ 275,000,000 issue. If Delmarva wishes to have the \$ 275,000,000 costs of its proposed LNG Storage Facility included in its annual GCR adjustment it needs to have clear language permitting it to do so – not an argument. If a tariff change is required, Delmarva should proceed through a normal tariff amendment to clearly so provide. And it would be better if the statute were revised to clearly provide for such an expansive reading of the definition of “fuel.” So I recommend that the Commission grant DPA/Staff Motion for Summary Judgment on this issue.

B. Does the Commission have the authority to provide Delmarva with a regulatory asset for the projected \$ 275,000,000 cost of the proposed LNG Storage Facility?

29. DPA and Staff argue that the Commission does not have the authority to provide Delmarva with a regulatory asset in this case. They point out in their joint Objection that there is no reason for Delmarva to seek to bypass the normal recovery process of seeking recovery for its costs when the asset is in service and becomes “used and useful.”

30. DPA and Staff further argue that the use of a regulatory asset should not be used by utilities simply to offset the costs of regulatory lag in the recovery of the costs of

construction of an asset. They argue that utilities are regularly compensated for the risk of regulatory lag in their rates of return.

31. Delmarva in its response argues that the Commission has regularly approved providing the utilities with a regulatory asset and cites specifically *Artesian* where the Commission went into some detail to discuss the standards for the creating of a regulatory asset.

32. I have read (and reread) *Artesian* with some degree of care, as I believe that with respect to the creation of a regulatory asset, it is controlling. Any proceedings prior to *Artesian* purported to be relied upon for either party's position, to the extent they are in conflict with *Artesian*, are inapposite.

33. The Commissioners in *Artesian* went to great lengths to clarify what they admitted were conflicting previous decisions with respect to the creation of regulatory assets.²⁵ In particular, they acknowledge that there was a line of precedents that required a showing by the utility that the expenses for which a regulatory asset treatment was being sought "were extraordinary and that denial of regulatory asset treatment would impair the financial viability of the utility or its ability to provide safe and reliable service."²⁶

34. Nevertheless, in *Artesian*, in rejecting several of the past precedents, the Commissioners stated that "the corporation should be incentivized, or at least, given the opportunity to be made whole... if it does something in the public interest." Further, the Commission stated "while it is difficult to create concise three of four characteristics to cover every situation where a regulatory asset is requested... the Commission has the discretion to make its decisions on a case-by-case basis."²⁷ The Commission has discretion. So the arguments by

²⁵ *Artesian*, *Op. cit.* at 7.

²⁶ *Id.* at 7.

²⁷ *Id.* at 8.

DPA/Staff as to why the Commissioners should not grant Delmarva a regulatory asset in this case and the countervailing arguments by Delmarva as to why they should, while well-stated, do not deter from the basic principle of *Artesian* that the Commission has the authority to grant a regulatory asset on a case by case basis. And that is the issue in this matter at this time; not whether a regulatory asset should, or should not, be created.

35. Accordingly, I recommend that the Commission deny the DPA/Staff Motion for Summary Judgment that the Commission is without the authority to grant a regulatory asset in this case should it choose to do so. The Commission has the authority.

36. Finally, because the parties have agreed that Delmarva does not need Commission approval to construct the LNG Storage Facility (and I agree), paragraph (1.) of Order 9362 prohibiting Delmarva from entering into construction contracts or ordering plant components related to its Petition, I recommend be lifted. Delmarva is free to begin construction of the LNG Storage Facility if it believes doing so is in the public interest. Delmarva would then be free to seek recovery in its next rate case for the costs of the facility when it is put into service and becomes “used and useful” in accordance with normal rate-making procedures. If Delmarva chooses to await the proceedings in this docket to seek Commission pre-approval of the LNG Storage Facility or to seek a regulatory asset for its costs, Delmarva is free to do so, but that is Delmarva’s choice.

37. Should the Commission agree with my Findings and Recommendations in this matter, the current docket should proceed in the normal course to provide to the Commission a full and complete record with respect to the remaining outstanding issues, including Delmarva’s contention that the Commission should consider pre-approval of the LNG Storage Facility and whether to grant to Delmarva a regulatory asset for its costs?

38. I would point out that in both DPA/Staff's Motion for Summary Judgment and in Delmarva's Response both parties went to great lengths to argue the substance of their respective positions. But as I stated above, the issue before me now (and before the Commission) is the DPA/Staff Motion for Summary Judgment, not the substance of the argued positions. To the extent the Commission affirms my Findings and Recommendations, the substantive issues will be considered as the docket proceeds. The issue at this time is solely whether or not the Commission has the authority to grant the relief sought. In one case I believe that it does not. In the other, I believe that it does.

VI. DECISION

39. For the reasons stated above, I recommend the Commission (i) grant the DPA/Staff Motion for Summary Judgment with respect to Delmarva's Petition to include the costs of the LNG Storage Facility in its annual GCR adjustment, (ii) deny the DPA/Staff Motion for Summary Judgment with respect to its argument that the Commission does not have the authority to grant to Delmarva a regulatory asset for the costs of the LNG Storage Facility should it so choose, (iii) lift paragraph 1 of Order 9362 prohibiting Delmarva from entering into construction contracts or ordering plant components and (iv) remand the docket to the Hearing Examiner for further proceedings consistent with these decisions.

Respectfully submitted,

/s/ Glenn C. Kenton

Glenn C. Kenton
Hearing Examiner

“Exhibit 1”

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE PETITION OF)	
DELMARVA POWER & LIGHT COMPANY FOR)	
REVIEW AND APPROVAL OF ITS PROPOSAL TO)	PSC DOCKET NO. 19-0110
CONSTRUCT A SATELLITE NATURAL GAS)	
STORAGE FACILITY)	
(Filed February 22, 2019))	

Order No. _____

I. BACKGROUND

1. On February 22, 2019, Delmarva Power & Light Company (“Delmarva” or the “Company”) filed the above-captioned petition (“Petition”) with the Commission seeking review and approval of its proposal to construct a satellite liquefied natural gas storage facility (“LNG Storage Facility”) in the southern region of its natural gas service territory and to seek recovery of its costs.

2. On April 3, 2019, this Docket was created by Order No. 9362 of the Public Service Commission of the State of Delaware (“Commission”) to consider Delmarva’s Petition. In Order No. 9362, Glenn Kenton was designated as the Hearing Examiner for this matter pursuant to the provisions of 26 *Del. C.* § 502 and 29 *Del. C.* Ch. 101 to schedule and conduct, upon due notice, such public comment sessions and evidentiary hearings, as may be necessary, to have a full and complete record concerning the justness and reasonableness of the Petition.

3. On April 30, 2019, the Delaware Public Advocate (“DPA”) and the Delaware Public Service Commission Staff (“Staff”) filed a Joint Objection to the Petition (the “Objection”).

5. On May 17, 2019, the Hearing Examiner received a letter from counsel to Delmarva advising him that Delmarva and counsel to DPA and Staff had agreed on a recommended procedure (“Agreed Procedures”) for resolving the Objection. In the Agreed Procedures, the parties recommended that:

(i) The Objection be treated as a “Motion to Dismiss/for summary judgment.”

(ii) Delmarva stated that it does not assert the Commission’s approval is a prerequisite to constructing the gas storage facility.

(iii) Delmarva will file a response to the Objection on May 30, 2019.

(iv) No further testimony, discovery, evidentiary hearing or other record is required for me to make a recommendation to the Commission – and for the Commission to make a determination in this Docket.

(v) The Hearing Examiner is to consider the Objection and Delmarva’s response and then issue a recommendation to the Commission by June 28, 2018, as to whether the Commission should (a) approve a regulatory asset, (b) approve Delmarva’s proposed alternative method of recovery, or (c) approve neither (a) nor (b).

(vi) The parties were to file any exceptions to the Findings and Recommendations as provided in the PSC Rules.

(vii) The Commission will then deliberate on the recommendations.

6. Delmarva’s letter containing the Agreed Procedures was duly filed in *Delafile*.

8. On May 30, 2019, per the Agreed Procedures, Delmarva filed its Response to the Objections.

9. On June 10, 2019, the Hearing Examiner filed his proposed Findings and Recommendations in this matter.

[10. Within the required time provided in the PSC Rule 2.19.3, both parties duly filed their objections to the Findings and Recommendations of the Hearing Examiner.]

II. DISCUSSION

9. We have reviewed the Findings and Recommendations of the Hearing Examiner in this matter.

[10. We have carefully considered the Exceptions filed by both DPA/Staff and Delmarva.]

11. We have considered the arguments made by counsel to all parties in oral argument before the Commission.

12. We agree with the Findings and Recommendations of the Hearing Examiner in this matter and the reasoning supporting such.

13. In particular, we agree that there is insufficient authority for Delmarva to include its costs of the proposed LNG Storage Facility in its annual GCR adjustment.

14. We further agree that the Commission has the authority, on a case-by-case basis, to grant a utility a regulatory asset, thus affirming our decision in *In re Artesian Water Co*, PSC Docket 16-1001, Order No. 9125.

15. Because all parties agree that Delmarva does not need pre-approval of the Commission to construct the LNG Storage Facility, we agree that paragraph 1 of Order No. 9362

prohibiting Delmarva from entering into construction contracts or ordering plant components be lifted.

**NOW, THEREFORE, IT IS ORDERED BY THE AFFIRMATIVE VOTES OF
NOT FEWER THAN THREE COMMISSIONERS:**

15. For the reasons discussed above, we affirm the Findings and Recommendations of the Hearing Examiner in this docket.

16. We grant the DPA/Staff Motion for Summary Judgment on the issue that there is insufficient authority to grant Delmarva's application for including the costs of the proposed LNG Storage Facility in its annual GCR adjustment.

17 We deny the DPA/Staff Motion for Summary Judgment that the Commission does not have the authority to grant to Delmarva a regulatory asset in this matter.

18. We hereby lift the prohibition contained in paragraph 1 of Order No. 9362 prohibiting Delmarva from entering into construction contracts or ordering plant components at this time.

18. Finally, we remand this matter to the Hearing Examiner for such further consideration as is consistent with this Order.

19 The Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

Chairman

Commissioner

Commissioner

Commissioner

Commissioner

ATTEST:

Secretary

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE PETITION OF)	
DELMARVA POWER & LIGHT COMPANY)	
FOR REVIEW AND APPROVAL OF ITS)	
PROPOSAL TO CONSTRUCT A SATELLITE)	PSC DOCKET NO. 19-0110
NATURAL GAS STORAGE FACILITY)	
(FILED FEBRUARY 22, 2019))	

**JOINT OBJECTION OF THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE
AND THE DELAWARE PUBLIC SERVICE COMMISSION STAFF ON THE
PETITION OF DELMARVA POWER & LIGHT COMPANY FOR APPROVAL TO
CONSTRUCT A SATELLITE NATURAL GAS STORAGE FACILITY**

BACKGROUND

On February 22, 2019, Delmarva Power & Light Company (“Delmarva” or the “Company”) filed a petition (“Petition”) with the Public Service Commission of the State of Delaware (the “Commission”) seeking authority to construct and operate a satellite liquefied natural gas storage facility (“Proposed LNG Facility”) in the southern region of its natural gas service territory.

Delmarva currently contracts with Eastern Shore Natural Gas (“ESNG”), an interstate pipeline, for firm transportation (“FT”) service to provide pressure support in the southern region of its service territory and ensure service reliability. Delmarva claims that it currently does not have available sufficient firm gas supply resources to meet the requirements of its customers on a Design Day, which represents the coldest day that can be reasonably expected to occur in its service territory. Delmarva claims that the Proposed LNG Facility will: (1) ensure that Delmarva has available sufficient firm gas supply to meet its sales customers’ requirements under Design Day conditions; and (2) enable Delmarva to reduce its ESNG FT contract quantities, thereby reducing its ESNG contract costs.

Delmarva claims that the estimated cost of construction and maintenance of the Proposed LNG Facility over a 30-year period is \$275 million. Delmarva claims the estimated 30-year costs of meeting its Design Day gas supply and pressure support requirements through interstate pipeline contracts is \$399 million. Therefore, Delmarva claims that the Proposed LNG Facility will result save its customers an estimated \$124 million over a 30-year period. Delmarva further claims that the Proposed LNG Facility represents the lowest cost alternative available to meet its Design Day gas supply and pressure support requirements.

Part of Delmarva’s request to construct the Proposed LNG Facility (perhaps the *main* impetus for the Petition) is approval of one of two proposed mechanisms to ensure it is able to recover the Proposed LNG Facility construction and operational costs on a timely basis. First, Delmarva proposes to recover the Proposed LNG Facility’s annual revenue requirement on a temporary basis through its Gas Cost Rates (“GCR”) until it files its first base rate case after the

Proposed LNG Facility is included in Plant in Service. Alternatively, Delmarva requests approval to establish a regulatory asset to defer the incremental depreciation and operation and maintenance expenses associated with the Proposed LNG Facility incurred between rate cases, and earn a return at the authorized rate of return on Net Plant in Service until such time the Commission can consider actual cost recovery in a base rate case or other appropriate proceeding.

In Commission Order No. 9362, dated April 3, 2019, the Commission designated a Hearing Examiner to conduct public comment sessions and evidentiary hearings in order to have a full and complete record concerning the justness and reasonableness of Delmarva's Petition. The Commission also afforded interested parties the opportunity to file comments or objections to the Petition. Such comments or objections must be filed on or before April 30, 2019.

Pursuant to Commission Order No. 9362, the Delaware Division of the Public Advocate ("DPA") and Commission Staff ("Staff") submit the following objections to Delmarva's Petition.

ARGUMENT

A. Delmarva Does Not Need the Commission's Approval to Construct and Operate the Proposed LNG Facility.

Delmarva cites no authority that requires it to obtain Commission approval to construct and operate the Proposed LNG Facility. That is not surprising as there is none. Delmarva does *not* need this Commission's approval to construct and operate the Proposed LNG Facility. What it *does* require Commission approval for, and what is driving this Petition, is its proposed cost recovery mechanisms – both of which are untraditional mechanisms for recovering in-between-rate case plant additions.

Delmarva – and Delmarva alone – decides what facilities it needs to construct to operate its natural gas business. Delmarva – and Delmarva alone – decides whether it needs to enter into contracts to operate its natural gas business. When choosing between two reasonable alternatives, we would hope that Delmarva's executives would select the lowest-cost reasonable alternative based on considerations of cost to ratepayers, regardless of when it might recover the costs. But, as Delmarva has frequently argued before this Commission, it makes the business decisions and the Commission may not second-guess those decisions.¹ If the Commission cannot second-guess those decisions, then why is Delmarva asking it to approve a business decision ahead of when the Company will take action? The answer is obvious: it wants assurance that it will recover 100% of every dollar it spends on the Proposed LNG Facility.

Under traditional ratemaking principles, the cost of plant placed into service between rate cases is included in a utility's rate base in its next rate case, along with the accompanying depreciation and accumulated depreciation adjustments.² Delmarva, however, does not want to

¹See transcript of April 16, 2019 oral argument on the Hearing Examiner's proposed findings and recommendations in Docket No. 17-0978 Phase II.

² The operation and maintenance costs are not appropriate for capitalization at all. They are operation and maintenance expenses, of which a representative amount is included in a utility's revenue requirement in a rate case.

wait until it files its next base rate case.³ That is a trade that Delmarva made, however, and this Commission should not ignore traditional ratemaking principles to bail Delmarva out of a situation it created.

Delmarva's cost estimates for the Proposed LNG Facility are only that – estimates. If preapproval is given, this Commission's hands – and the hands of whatever Commission is sitting at the time of Delmarva's next rate case – as to what they can do if the construction of the Proposed LNG Facility winds up costing more than proposed. And cost overruns are not unimaginable, as the debacle with Santee Cooper's and South Carolina Electric & Gas' nuclear plant demonstrates.

Once the Commission approves Delmarva's decision, it severely limits its options in the next rate case when Delmarva will seek to put the entire cost of the Proposed LNG Facility in rate base. Delmarva has proffered no explanation why the usual ratemaking treatment for in-between-rate case plant additions is improper here. This Commission has declined to preapprove utility business decisions in the past, and Staff and the DPA respectfully submit that it should not start now.⁴

B. None of the Company's Requested Ratemaking Treatment Should Be Approved.

1. The Company's Proposal to Temporarily Recover the Costs of the Proposed Facility Through the GCR Cannot Be Approved Because the Fuel Adjustment Clause Only Permits Recovery of Fuel Costs, Not the Cost of Plant that Holds Fuel.

The Company's proposal to recover the costs of the Proposed Facility through its GCR cannot be approved because the fuel adjustment clause only permits the recovery of *fuel costs*, not the cost of plant that holds (or does anything else with) fuel.

Fuel adjustment clauses are intended "to mitigate the effect of relatively volatile-cost items the [utility] purchases on a continuous basis in the market place."⁵ Before the enactment of what is now 26 *Del. C.* § 303(b), the utility's cost of fuel was treated as an ordinary operating expense in rate cases. Fuel costs are still ordinary operating expenses;⁶ all that 26 *Del. C.* § 303(b) did was to allow fuel costs to be recovered outside the context of a full rate case, which, at the time current section 303(b) was enacted, were less frequent than they are now. Nothing in Section 303(b) indicates that the General Assembly intended for plant, even if it is fuel-related, and even if it is only temporary, to be recovered through the GCR. Indeed, in *Delmarva Power & Light Co. v.*

³Delmarva's and Chesapeake's Distribution Service Improvement Charge legislation enacted by the General Assembly prevents Delmarva from filing a base rate case prior to January 1, 2020. *See* 26 *Del. C.* § 315(e). The "stay out" was of Delmarva's own doing in order to get the bill through the General Assembly.

⁴Delmarva may argue that the Commission has approved other initiatives before they were implemented, such as the Advanced Metering Infrastructure ("AMI"). But the General Assembly specifically directed the Commission to consider AMI for regulated electric utilities (not regulated gas utilities). *See* 26 *Del. C.* § 1008(b)(1)b. The Legislature has given the Commission no such direction here.

⁵K. Kelly, T. Pryor and N. Simons, Jr., "Electric Fuel Adjustment Clause Design," ch. 1, p. 1 (1979), retrieved on April 29, 2019 from <http://ipu.msu.edu/wp-content/uploads/2016/12/Kelly-Pryor-Simons-Fuel-Adjustment-79-37-Dec-79.pdf>

⁶*Id.*

*Public Service Commission*⁷ (a case which Delmarva often cites to this Commission), the Delaware Supreme Court recognized that “[t]he purpose of a fuel adjustment clause is to permit a public utility company to pass through to its customers increases or decreases in *the cost of fuel* without resort to the regulatory review process typical of rate proceedings generally.”⁸

The Public Utilities Act does not define “fuel.” Thus, it must be given its common and ordinary meaning.⁹ The common and ordinary definitions of “fuel” are: “combustible matter used to maintain fire, such as coal, wood, oil, or gas, in order to create heat or power;” and “an energy source for engines, power plants, or reactors.”¹⁰

Clearly, the Proposed LNG Facility is not “fuel. And just as clearly, Delmarva is not purchasing a Proposed LNG Facility “on a continuous basis in the market place.” Thus, its costs are not properly recovered through the GCR.

The Proposed Facility that Delmarva seeks approval to construct is plant. And the General Assembly has defined plant as a component of rate base: “Rate base means ... [t]he original cost of all used and useful utility *plant* and intangible assets either to the first person who committed said plant or assets to public use or, at the option of the Commission, the first recorded book cost of said plant or assets; ... ”¹¹ Plant, even if it will be used to hold fuel, is not a *fuel cost*.

The Proposed LNG Facility is not a fuel cost properly recovered through Delmarva’s GCR. Delmarva’s request that the costs of the Proposed LNG Facility be recovered through the GCR until it is placed into plant in service in its next rate case should be rejected.

2. Delmarva’s Natural Gas Tariff Specifically Excludes Expenses Associated With Operating and Maintaining Company-Owned Liquefied Natural Gas Facilities.

Aside from the fact that the GCR statute does not permit recovery of the costs of constructing and operating the Proposed LNG Facility, Delmarva’s own natural gas tariff specifically excludes construction and operation costs associated with Company-owned LNG facilities. It apparently did not consult its tariff before preparing its Petition and proposing this method of recovery, but if it had, it would have found the following on Fifth Revised Leaf No. 32:

Section XX – Gas Cost Rate Clause:

A. Gas Cost Rate Clause

The monthly rates contained in Service Classifications RG, GG, MVG, and LVG shall include a gas cost rate each month to reflect total purchased gas costs. Total purchased gas costs will be separated into purchased gas

⁷508 A.2d 849 (Del. 1986).

⁸*Id.* at 852 (emphasis added).

⁹*Ross v. Dep’t of Correction*, 697 A.2d 377, 378 (Del. 1977); *Matter of Surcharge Classification 0133 by Del. Comp. Rating Bureau, Inc.*, 655 A.2d 295, 303 (Del. Super. 1994) (where statute does not define a word, it should be given its common ordinary meaning).

¹⁰<https://www.dictionary.com/browse/fuel?s=t>, retrieved on April 29, 2019.

¹¹26 Del. C. § 102(3).

commodity costs and upstream demand-related gas costs. Total gas cost recovery will occur as the result of the Petition of a purchased gas commodity cost recovery component and a demand-related cost recovery component to customer billing determinants.

Total gas costs shall consist of:

- (1) The amount charged to FERC Accounts 803, 804, and 804.1, which includes commodity purchases, transportation, demand, storage and capacity charges; plus
- (2) The amounts charged to FERC Account 808.1, which includes the cost of gas withdrawn from storage; less
- (3) The amounts credited to FERC Accounts 804.1 and 808.2, which includes the cost of gas delivered to storage; plus
- (4) The amounts charged to FERC Account 728, which includes liquid petroleum gas and unmixed propane gas; plus
- (5) All additional charges paid to the Company's suppliers for prior periods; plus
- (6) The costs paid to third parties as part of a gas price hedging program approved by the Commission, including payments to obtain an option, whether or not exercised, payments to obtain a price band or cap, swap transaction costs, and other similar costs, less revenues or payments received for the sale of an option, swap transaction revenues, or similar revenues or payments received; less
- (7) Revenues received from the Company's Firm Storage and Standby Services; less
- (8) All refunds received from the Company's suppliers for prior periods.¹²

This provision does not use the word "includes," which would permit unnamed items of similar ilk to be "gas costs." Rather, the tariff says that "gas costs *shall consist of* ..." That language admits of no additions to the specified items.

And if that language were not enough, the same section of Delmarva's natural gas tariff further provides that "Gas Costs *specifically exclude* expenses associated with operation and maintenance of *Company Owned Liquefied Natural Gas Facilities*."¹³

Tariffs have the same effect as statutes,¹⁴ and a public utility's tariff is an expression of regulatory policy.¹⁵ Delmarva's tariff language is clear as to what constitutes "gas costs" (the eight enumerated items) and what does not (expenses associated with Company-owned LNG facilities). Where statutory (tariff) language is clear, that language controls, and the Commission cannot "vary the terms of a statute of clear meaning or ignore mandatory provisions."¹⁶

¹²<https://www.delmarva.com/SiteCollectionDocuments/DPL%20DE%20Gas%20Tariff.pdf> (Section XX.A.(1)-(8)).

¹³*Id.* (emphasis added).

¹⁴73B C.J.S. *Public Utilities* §7.

¹⁵*Georgia-Pacific Corp. v. Delmarva Power & Light Co.*, 1992 WL 396307, *6 (Del. Ch. Dec. 31, 1992).

¹⁶*Zambrana v. State*, 115 A.3d 713, 715 (Del. 2015).

Furthermore, Section I – General, Paragraph D. of Delmarva’s Tariff provides that its Rules and Regulations “are a part of every contract for service and govern all classes of service unless otherwise specifically stated by a Service Classification.”¹⁷ The Commission may not, “under the guise of construing” a contract, rewrite it to supply omissions in its provisions.¹⁸

Finally, even if a statute is ambiguous (which this tariff is not), ambiguities will be construed against the drafter.¹⁹ Delmarva drafted its tariff language, and so if there is any ambiguity, it should be construed against Delmarva. As demonstrated above, however, the tariff’s “gas costs” language clearly does not include LNG facility-related costs.

If the Commission approves Delmarva’s proposed GCR-based recovery mechanism, it will be acting in direct contravention of the clear tariff-statutory language. Delmarva is bound by its own tariff language, which specifically excludes LNG-related costs from the definition of “gas costs” recoverable through the GCR. Whether a matter of statutory or contract interpretation, its request to recover the Proposed LNG Facility costs through the GCR must be rejected.

3. The Company’s Request for Regulatory Asset Treatment Should Be Rejected.

a. Introduction.

Delmarva asserts that its alternative ratemaking treatment – a regulatory asset on which it earns a return – is a “traditional” method of recovering plant costs.²⁰ Not so. As discussed previously, under “traditional” ratemaking principles, plant placed in service in between rate cases is not included in a utility’s rate base until its next rate case.

As the Commission knows, Statement of Financial Accounting Standards No. 71 provides that in order for a utility to record a regulatory asset, the regulator must find that it is “probable that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for ratemaking.”²¹ Thus, if the Commission grants the requested regulatory asset treatment, it will be saying that Delmarva is more likely than not to recover the costs. As we argued in Section A, this essentially ties this Commission’s hands, or the hands of whatever Commission is sitting, when Delmarva seeks to recover the regulatory asset.

The Commission should reject Delmarva’s requested regulatory asset. It is not used and useful in providing utility service, and it is akin to Construction Work in Progress (“CWIP”), which this Commission has repeatedly declined to include in a utility’s rate base. And the operation and maintenance expenses are inappropriate for capitalization; rather, the Commission includes a representative amount of such expenses in the utility’s revenue requirement in a rate case.

¹⁷<https://www.delmarva.com/SiteCollectionDocuments/DPL%20DE%20Gas%20Tariff.pdf> (Section I.D.).

¹⁸*AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008).

¹⁹*Twin City Fire Ins. Co. v. Delaware Racing Association*, 840 2d. 624, 630 (Del. 2003).

²⁰Petition at ¶20. It is “traditional” only in the sense that Delmarva has “traditionally” requested regulatory asset treatment for almost every cost it has incurred in between rate cases for at least the last five years and maybe more. See, e.g., Docket No. 17-1094 (electric vehicle charging infrastructure); Docket No. 18-0953 (costs of implementing an advance payment program).

²¹Statement of Financial Accounting Standards No. 71, ¶9.a.

b. The Proposed LNG Facility Is Not Used and Useful, and Therefore Should Not Be Included in Rate Base and Earning a Return.

In order to be included in rate base, plant must be used and useful in providing utility service. "Rate base means ... [t]he original cost of all used and useful utility *plant* and intangible assets either to the first person who committed said plant or assets to public use or, at the option of the Commission, the first recorded book cost of said plant or assets;" ²² In requiring plant sought to be included in rate base to be used and useful, the General Assembly struck a balance between the interests of a utility's shareholders and its ratepayers. Ratepayers should not have to pay for plant that is not yet providing them with service, and in return the utility is permitted to earn a return that compensates it for the lag time between when the plant is completed and when it is included in rate base.

Delmarva's proposed regulatory asset treatment for the Proposed LNG Facility eliminates that balance and provides Delmarva's shareholders with a windfall. The Proposed LNG Facility has not even been *built* yet. By definition, it is not "used and useful," and it will not be used and useful until it is completed and placed into service. However, if Delmarva receives its regulatory asset treatment for the costs, they will earn a return as if they *were* used and useful. The General Assembly did not intend for the playing field to be so tilted in shareholders' favor.

c. Granting Delmarva's Requested Regulatory Asset Treatment Is No Different than Including CWIP in Rate Base, and the Commission Has Rejected Utility Requests to Include CWIP in Rate Base.

Until the Proposed LNG Facility is completed and placed into service, it is CWIP. This Commission does not include CWIP in rate base. ²³ If CWIP is excluded from rate base in a rate case because it is not used and useful, Delmarva should not be permitted to earn a return of and on the Proposed LNG Facility costs through the back-door mechanism of a regulatory asset.

CONCLUSION

Delmarva's request for the Commission to approve its business decision to construct and operate the Proposed LNG Facility should be rejected. First, Delmarva does not need Commission permission to construct and operate the Proposed LNG Facility; it seeks Commission approval only because it wants the Commission to approve its proposed ratemaking treatments, which would reduce to zero any risk of non-recovery.

Second, even if the Commission were inclined to preapprove Delmarva's Proposed LNG Facility, Delmarva's proposed GCR recovery mechanism is legally impermissible because plant construction and operation and maintenance costs are not "gas costs," either as that term is commonly understood or as it is defined in Delmarva's own tariff. Nor should the Commission accept Delmarva's invitation to create yet another regulatory asset. Utilities are awarded an

²² 26 Del. C. §102(3).

²³ *In the Matter of the Petition of Delmarva Power & Light Company for an Increase in Electric Base Rates and Miscellaneous Tariff Changes*, Docket Nos. 09-414 and 09-276T, Final Findings, Opinion & Order No. 8011, para. 67 (Del. PSC August 9, 2011).

opportunity to earn a return on equity that compensates shareholders for the risks involved in operating a utility. One of those risks is that the utility may not have immediate or full recovery of costs it incurs. Unless Delmarva agrees to reduce its return on equity to recognize the substantial reduction in risk that its requested ratemaking treatment will provide to shareholders, the Commission should deny regulatory asset treatment for the Proposed LNG Facility costs.

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Counsel for the Delaware Public Service
Commission Staff

Dated: April 30, 2019

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE PETITION OF)	
DELMARVA POWER & LIGHT COMPANY)	
FOR REVIEW AND APPROVAL OF ITS)	
PROPOSAL TO CONSTRUCT A SATELLITE)	PSC DOCKET NO. 19-0110
NATURAL GAS STORAGE FACILITY)	
(FILED FEBRUARY 22, 2019))	

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2019, I caused a copy of the attached **JOINT OBJECTION OF THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE AND THE DELAWARE PUBLIC SERVICE COMMISSION STAFF ON THE PETITION OF DELMARVA POWER & LIGHT COMPANY FOR APPROVAL TO CONSTRUCT A SATELLITE NATURAL GAS STORAGE FACILITY** to be filed with the Delaware Public Service Commission using Delafile and to be served on the persons identified below via electronic mail.

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May 30, 2019

**Via Electronic Mail
and DelaFile**

Donna Nickerson
Secretary, Delaware Public Service Commission
861 Silver Lake Blvd.
Cannon Building, Suite 100
Dover, DE 19904

Re: In The Matter of the Petition of Delmarva Power & Light
Company for Review and Approval of its Proposal to Construct a
Satellite Natural Gas Storage Facility Docket No. 19-0110

Dear Ms. Nickerson:

Attached for filing with the Commission is the Response of Delmarva Power & Light Company to the Objection (Motion for Summary Judgment) of Commission Staff and the Public Advocate.

Should you have any questions, please do not hesitate to contact either me or Steve Baccino at (302) 451-5271.

Sincerely,

Todd L. Goodman

encl.

ccs with encl.:

Glenn C. Kenton
Thomas Walsh
Regina Iorii
William O'Brien
Matthew Hartigan

In the Public Service Commission of the State of Delaware

In The Matter of the Petition of)	
Delmarva Power & Light Company)	
for Review and Approval of its)	
Proposal to Construct a Satellite Natural)	PSC Docket No. 19-0110
Gas Storage Facility)	
)	
(filed February 22, 2019))	

**RESPONSE OF DELMARVA POWER & LIGHT COMPANY
TO THE JOINT OBJECTION (MOTION FOR SUMMARY JUDGMENT)
OF THE PUBLIC ADVOCATE AND COMMISSION STAFF**

I. Introduction and Procedural Posture

On February 22, 2019, Delmarva Power & Light Company (“Delmarva” or “Delmarva Power”) filed a petition (“Petition”) with the Delaware Public Service Commission (the “Commission”) in which it sought:

- (1) Commission review and approval for the construction of a satellite liquified natural gas storage facility (the “Proposed Facility”) and
- (2) Commission approval of one of two regulatory lag mitigating mechanisms – either:
 - a. A temporary GCR-based alternative to the traditional regulatory asset-based approach¹ – or
 - b. Approval of a traditional regulatory asset.²

Delaware Public Service Commission Staff (“Staff”) and the Division of the Public Advocate (“DPA”) propounded discovery requests to Delmarva with respect to the Petition and Delmarva responded. Chesapeake Utilities (“Chesapeake”) filed a Petition to Intervene in the docket. No party objected, and Chesapeake was granted intervenor status.

¹ Petition at ¶ 19. Prefiled Direct testimony of Kristin McEvoy at pg 2, line 6 through pg 5, line 9.

² Petition at ¶ 20. Prefiled Direct testimony of Kristin McEvoy at pg 6, line 3 through pg 7, line 17.

On April 30, 2019, DPA and Staff submitted a filing labelled “Joint Objection.” Thereafter, Hearing Examiner Glenn C. Kenton asked the parties to provide their position(s) regarding how the Objection should be addressed.³ By letter dated May 17, 2019, the parties informed Hearing Examiner Kenton that they had agreed to a proposed approach that would (a) address the Objection and (b) serve as both a procedural schedule and a procedural mechanism for bringing this docket to the Commission for a final order in an efficient and timely manner.⁴ Thereafter, Hearing Examiner Kenton issued Revised Order No. 9388 (“Revised Order”), in which he adopted the parties’ proposal.

II. Standard of Review

When a court considers matters extraneous to the pleadings, the summary judgment standard is applied. *See Doe 30’s Mother v. Bradley*, 58 A.3d 429, 444 (Del. Super. Ct. 2012). As reflected in the Revised Order, the Joint Objection is being treated as a “Motion to Dismiss/for Summary Judgment.” Revised Order ¶ 5(i). Delmarva has filed testimony and responded to discovery promulgated by Staff and DPA concerning facts discussed in the Joint Objection. Consequently, summary judgment is the appropriate standard. Because the parties agree that no further factual record is needed, the written submissions of the parties are equivalent to cross-motions for summary judgment.

The purpose of summary judgment is “to provide a method by which issues of law involved in a litigation may be speedily brought before a trial court and disposed of without delay.” *AeroGlobal Mgmt, LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005). Summary judgment should be granted “if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

³ *See*, email to parties from Hearing Examiner Kenton dated May 7, 2019.

⁴ *See*, Letter to Glenn C. Kenton, Esquire dated May 17, 2019.

III. Facts

The relevant facts are not in dispute. They are set forth in the Petition, which, for the convenience of the Hearing Examiner and the parties, are quoted below directly from the Petition.

I. Natural Gas Distribution and Supply Service

A. Natural Gas Distribution

1. *Delmarva is engaged in the business of, inter alia, providing regulated natural gas (or "gas") distribution service to customers within its service territory in the State of Delaware, which is limited to approximately the northern two-thirds of New Castle County. In general terms, distribution charges (also known as "delivery" charges) are comprised of the costs associated with operating, maintaining and where necessary and appropriate, adding to Delmarva's distribution system within its natural gas service territory.*

B. Natural Gas Supply

2. *In addition to natural gas distribution service, Delmarva "supplies" the natural gas itself to the majority of its gas delivery customers. In general, "Supply" [or GCR] charges are comprised of (a) the cost of the natural gas itself (i.e., the commodity) and (b) the costs Delmarva Power incurs in having the gas delivered to Delmarva Power's distribution system (i.e., the costs incurred for delivering/transporting, storing, etc. the gas on non-Delmarva Power infrastructure until the gas physically reaches Delmarva's distribution system infrastructure). Delmarva's Commission-approved Supply [or GCR] charges are comprised of component costs that are not at issue in this docket. For purposes of this docket, Delmarva will focus upon the two elements of its Supply/[GCR] charges paid by customers that are of primary relevance to this docket – peak supply and pressure support.*

(i) Peak Supply and Design Day Reserve Margin

3. *In order to reasonably ensure that Delmarva will have enough gas to meet the demands of its customers on peak days (i.e., the coldest expected days of the year when gas use is highest), Delmarva develops what is referred to as a "Design Day" forecast. The Design Day represents the coldest day that can be reasonably expected. Gas consumption on a Design Day will be at a "peak." To ensure that Delmarva will have sufficient gas to supply its customers on a Design Day (i.e., to meet its "Peak Supply"), Delmarva calculates a Design Day Reserve Margin. The Reserve Margin is*

the percentage above the amount of natural gas Delmarva's customers will need on a Design Day. The desired Design Day Reserve Margin is 2% - 5%. Any amount below that 2% - 5% Reserve Margin is considered a "Design Day Reserve Margin Shortfall" and must be addressed.

4. *Due to a combination of customer growth (more customers using gas) and changing weather patterns, the projected Design Day Reserve Margin for the 2018-19 GCR year is negative 5.3%, which constitutes a Shortfall that must be addressed. Currently Delmarva is addressing the projected Design Day Reserve Margin Shortfall with temporary short term Peak Supply agreements; however, as described in the prefiled Direct Testimony of Delmarva Witness James B. Jacoby, such Peak Supply agreements are expensive and do not provide a firm source of Peak Supply.*

(ii) Pressure Support

5. *Another important component of Supply [GCR] cost is "Pressure Support." Pressure Support is a contractual service provided by the interstate pipelines that helps ensure that there is enough pressure in Delmarva Power's distribution system to enable the natural gas to reach all of Delmarva Power's natural gas customers. As demand for gas increases on peak days, more Pressure Support is needed to push the gas through the distribution system to customers. The farther customers are located from the points at which the gas is transferred from interstate pipelines to Delmarva's distribution system, the more Pressure Support is required. Accordingly, the need for Pressure Support is highest in the southern region of Delmarva Power's natural gas service territory [Delaware City is generally southern end of Delmarva's natural gas territory].*

II. Alternatives for Addressing Growing Supply and Pressure Support Needs

A. Interstate Pipeline Contracts

6. *Traditionally, Delmarva has met the Peak Supply and Pressure Support needs of its customers through multiple long-term interstate pipeline contracts. As noted previously, Delmarva has identified a need for new Supply to meet increased system demand for natural gas. Several of the existing interstate pipeline contracts that provide Pressure Support have varying expiration and contract renewal dates throughout years 2020-2024. Delmarva cannot allow these contracts to expire without alternative sources for Pressure Support in place. Accordingly, Delmarva must either (a) begin negotiations and enter into new interstate pipeline contracts or (b) find an alternative source for the services those expiring contracts currently provide.*

7. *Complicating matters is the fact that simply renewing the interstate pipeline contracts that will expire in 2020-2024 will not address either (a) the current projected Design Day Reserve Margin Shortfall or (b) the growing future needs of Delmarva's gas customers. Delmarva Power's Pressure Support and Supply needs have grown and continue to grow. That growth has led to the current Design Day Reserve Margin Shortfall. Therefore, in addition to replacing the existing interstate pipeline contracts as they expire, Delmarva needs to find additional sources of Peak Supply and Pressure Support to meet both the current and future needs of its natural gas customers.*

8. *The costs associated with interstate pipeline contracts (including Supply and Pressure Support) are currently recovered through Delmarva Power's GCR. Years of collaborative review with Commission Staff and the Public Advocate have resulted in a consensus that Delmarva should explore potential options for addressing the current and future needs of its natural gas customers through sources other than the traditional long-term interstate pipeline contract approach.*

B. Proposed Satellite LNG Storage Facility

9. *Delmarva has conducted a thorough review of potential options for addressing the current and future Peak Supply and Pressure Support needs of its customers. After considering several potential alternatives, it became clear to Delmarva that the construction of a Satellite Liquefied Natural Gas ("LNG") Facility (the "Proposed Facility") would provide a lower cost and more reliable alternative means of providing Peak Supply and Pressure Support for Delmarva's natural gas customers.*

(i) Substantial Savings for Customers

10. *Construction of the Proposed Facility would eliminate both (a) the need to renew several expiring interstate pipeline contracts and (b) the need to enter into additional contracts to address both the current Design Day Reserve Margin Shortfall and the growing demand for natural gas.*

11. *The estimated cost of construction, operation and maintenance of the Proposed Facility over a 30 year period is \$275 million. The estimated 30 year cost of meeting the same needs through interstate pipeline and upstream Supply contracts is \$399 million. The result of building the Proposed Facility would be an estimated savings to Delmarva's customers of \$124 million over a 30 year period compared to addressing the same needs through the traditional interstate pipeline contract approach*

(ii) Improved Reliability and Flexibility

12. *In addition to saving an estimated \$124 million for customers, the Proposed Facility will provide improved Supply and delivery reliability. Reliance upon interstate pipelines for Supply and Pressure Support involves hundreds of miles of potential interstate pipeline incidents that could reduce, restrict or even eliminate gas flow and pressure. Providing Peak Supply and Pressure Support service from a local facility reduces those interstate pipeline risks.*

13. *Pressure Support is needed most in the southern portions of Delmarva Power's natural gas service territory, which is where the Proposed Facility will be located. As a result, the Proposed Facility will provide critically-important peak Pressure Support directly where Pressure Support is most needed.*

14. *The Proposed Facility will be able to both liquify natural gas for storage and accept liquified gas trucked in from an outside source, providing enhanced flexibility and Supply reliability.*

* * *

The facts above, which are quoted directly from Delmarva's Petition, are set forth in greater detail in the Prefiled Direct Testimonies of Delmarva Witnesses James B. Jacoby and Jeffrey Miles.

IV. Argument

A. COMMISSION APPROVAL TO CONSTRUCT AND OPERATE THE PROPOSED FACILITY

Delmarva has never claimed that Commission approval to construct and operate the Proposed Facility is a legal prerequisite to building it. Delmarva agrees that neither the Hearing Examiner nor the Commission itself need to pre-approve the Proposed Facility in order for Delmarva to construct and operate it.⁵ The decision of whether the Commission will *choose* to approve the Proposed Facility is up to the Commission itself.

⁵ In the May 17, 2019 letter to Hearing Examiner Kenton, Delmarva explained and agreed as follows:

Unfortunately Staff and DPA have challenged Delmarva's motive for seeking approval.

The assertion is incorrect and must be addressed. DPA and Staff assert:

*"Delmarva cites no authority that requires it to obtain Commission approval to construct and operate the proposed LNG Facility. That is not surprising as there is none.... Delmarva - and Delmarva alone -- decides what facilities it needs to construct to operate its natural gas business. Delmarva -- and Delmarva alone -- decides whether it needs to enter into contracts to operate its natural gas business."*⁶

DPA and Staff rhetorically question Delmarva's motive for seeking Commission approval to construct the Proposed Facility and tender the following accusation: "[t]he answer is obvious: [Delmarva] wants assurance that it will recover 100% of every dollar it spends on the Proposed LNG Facility."⁷

There is an established practice of seeking and obtaining Commission pre-investment approval for significant investments that would alter longstanding practice or, for other reasons, are of a nature that the Commission might wish to review and potentially approve before the investment is made, as part of the Commission's responsibility to supervise utilities and ensure reliable service in the future. For example, prior to 2008, Delmarva met its obligation to secure the renewable energy credits (RECs) necessary to comply with the Renewable Energy Portfolio Standards Act (REPSA) through the annual Standard Offer Service auctions.⁸ When Delmarva

"Delmarva does not assert that Commission pre-approval is a legal prerequisite to constructing the proposed Facility (i.e., Delmarva does not claim that it is legally prohibited from constructing the facility if the Commission does not pre-approve it). For purposes of resolving the Objection and the docket as set forth in this letter, Delmarva will agree (and will explain in its response to the Objection) that Your Honor and the Commission do not need to address the issue of Commission pre-approval."

⁶ Objection at pg 2.

⁷ *Id.*

⁸ Under REPSA, Delmarva is required to provide an increasing percentage of its electricity from renewable energy sources until 2025, when the percentage tops out at 25%. 26 Del C. § 354 (a). Delmarva meets REPSA compliance

proposed obtaining a significant portion of those RECs through three long term contracts with wind farms in Maryland and Pennsylvania, it first sought Commission review and approval of that change in the manner of conducting business. The Commission approved those contracts and Delmarva's proposed new mechanism for obtaining RECs.⁹

In 2010, Delmarva proposed a similar new approach to obtaining a significant portion of Solar RECs (SRECs) from a solar farm outside of Dover, Delaware. Delmarva sought Commission approval to enter into a long term contract with the Dover SunPark. The Commission approved both that contract and Delmarva's proposed new mechanism for obtaining SRECs.¹⁰

In 2017, when Delmarva Power proposed investing, the first time, in electric vehicle charging stations and infrastructure, it again sought Commission review and approval. Both Staff and DPA entered into a settlement agreement with Delmarva in 2019, which provides for Commission approval of Delmarva's construction, installation and operation of electric vehicle infrastructure. That settlement will soon be presented to the Commission for its review and approval.¹¹

The instant case also constitutes a prime example of the type of situation where Commission approval is sought. For at least the last 43 years, Delmarva Power has met the

through the purchase and retirement of Renewable Energy Credits ("RECs"). 26 *Del C.* § 355. Delmarva Power does not generate the electricity it delivers to its customers. Customers have the option to either: (a) choose their own electric supplier or (b) have Delmarva buy their electricity for them through what is called "Standard Offer Service" ("SOS"). Over 90% of Delmarva's electric customers choose to remain on SOS. Each year, Delmarva conducts three auctions where electric generators/suppliers compete to provide SOS electricity for Delmarva's customers. The lowest bidders win the right to be the SOS supplier. Before 2008, Delmarva obtained all of the RECs needed to comply with REPSA through the Standard Offer Service Auctions.

⁹ Order No. 7462, Docket No. 08-205, October 23, 2008.

¹⁰ Order No. 7826, Docket No. 10-198, September 7, 2010.

¹¹ See ¶¶ 3 and 4 of executed Proposed Settlement Agreement in Docket No. 17-1094, January 2019 (provided in Compendium of Authorities).

growing peak supply and pressure support needs of its customers through contracts for interstate pipeline capacity, supply and pressure support.¹² The costs of those contracts are reviewed and, if appropriate, approved by the Commission through the annual Gas Cost Rate (GCR) docket.¹³ For the last several annual GCR dockets, Delmarva's projected design day shortfall and the rising costs of interstate pipeline contracts has been an issue of concern to Staff, DPA and the Commission itself.¹⁴ In fact, Final Order 9383 in the most recent GCR docket, entered by the Commission just last week (May 21, 2019), provides that Delmarva will not renew two expiring interstate pipeline contracts, which the parties agreed are expensive and, due to changed market circumstances, are no longer beneficial for Delmarva's customers.¹⁵ Furthermore, due to Delmarva's projected Design Day Reserve Margin Shortfall, the last several GCR orders have prohibited customers who have chosen another gas supplier from returning the Delmarva's GCR gas supply service.¹⁶ The reason these customers cannot currently be permitted to return to GCR service is because, due to the design day reserve margin shortfall, there is not enough gas available. Construction of the Proposed Facility would remedy this condition and provide for continued growth.¹⁷ Likewise, the concerns of Staff and DPA regarding the need to address

¹² Delmarva's Petition at ¶ 7 and Direct Testimony of James B. Jacoby at page 3 – 4. The Delaware Fuel Adjustment Clause statute, 26 *Del. C.* §303(b), was enacted 43 years ago on May 28, 1976. 60 *Del. Laws*, c. 431, § 1.

¹³ Delmarva's Petition at ¶ 9 and Direct Testimony of James B. Jacoby at pg 3, lines 16 – 17.

¹⁴ Prefiled Direct Testimony of James Jacoby at pg 5, lines 3 through pg 6, line 9.

¹⁵ See ¶ 9 of Proposed Settlement approved in Order No. 9383, Docket No. 18-1049 (May 21, 2019).

¹⁶ *Id.* at ¶ 10. This same concern is reflected in ¶ 10 of the GCR Settlement approved in Order No. 9055, Docket No. 16-0089 (May 9, 2017) and in ¶ 16 of the GCR Settlement approved by Order No. 9214, Docket No. 17-1013 (May 8, 2018). The terms "non-core" and "transportation service" customers (as used in the Settlement Agreements) represent Delmarva Power customers who have decided to obtain their natural gas supply service from competitive suppliers, rather than through Delmarva's GCR "sales service." The term "sales service" refers to customers who are supplied with natural gas by Delmarva under the GCR.

¹⁷ Petition at ¶ 12. Direct Testimony of James Jacoby at pg 3, line 16 through pg 4, line 7; pg 4, line 18 through pg 5, line 9; and pg 18.

Delmarva's Design Day Reserve Margin Shortfall have also been specified in previous Commission-approved GCR Settlement Agreements.¹⁸

The construction of the Proposed Facility would, among other benefits: (a) resolve Delmarva's projected Design Day Reserve Margin Shortfall, (b) alleviate the need to renew expiring interstate pipeline contracts, and (c) allow choice customers to return to Delmarva's GCR gas supply service.¹⁹ Those benefits for customers are in addition to the fact that the Proposed Facility will save Delmarva's customers approximately \$124 million over a 30 year period compared to addressing the same needs through the traditional interstate pipeline contract approach.²⁰ However, the construction and operation of the Proposed Facility would constitute a paradigm shift in the manner in which Delmarva Power has addressed the growing peak supply and pressure support needs of its customers since 1976. Rather than meeting those needs through contracts for additional interstate pipeline resources, the costs of which are reviewed and approved by the Commission every year through the GCR docket, the Proposed Facility would meet those needs through a Delmarva-owned and operated Satellite LNG Plant. The Proposed Facility would remove approximately \$399 million (\$13.3 million per year) in natural charges from the annual GCR docket over the next 30 years. For those reasons, Delmarva submits that the Proposed Facility – a new approach to a 43 year-old way of doing business – is the type of investment that the Commission would want to review, and if it sees fit, approve.

¹⁸ See ¶ 14 of the GCR Settlement approved by Order No. 9214 (*"The parties agree that, due to the changed facts, it is now important for Delmarva to address the capacity reserve deficiency indicated by the negative [design day] reserve margin."*)

¹⁹ Petition at ¶ 12. Direct Testimony of James Jacoby at pg 3, line 16 through pg 4, line 7; pg 4, line 18 through pg 5, line 9; and pg 18.

²⁰ *Id.*

Delmarva agrees that Commission pre-approval is not a legal prerequisite to the construction and operation of the Proposed Facility. Accordingly, neither the Hearing Examiner nor the Commission itself are *required* to address the issue of Commission pre-approval to construct and operate the Proposed Facility.²¹ Nevertheless, the statement made by Staff and DPA concerning Delmarva's motivation for seeking Commission approval to construct and operate the Proposed Facility is inaccurate and unnecessary. Seeking Commission approval to construct and operate the facility is not a legal precondition; however, it is consistent with past practice and wholly appropriate. The parties' agreement that pre-approval is not legally required does not constrain the Commission. Whether the Commission wants to approve the Proposed Facility (as it has done in the numerous cases, including the examples cited above) remains within the Commission's discretion.

B. THE TEMPORARY GCR-BASED REGULATORY LAG MITIGATION ALTERNATIVE

The Proposed Facility, if constructed, will constitute a large investment for Delmarva Power's Gas Division. This initial capital cost for constructing the Facility is \$40 million.²² Regulatory lag poses a significant concern with an investment of this size.²³ The traditional approach for mitigating regulatory lag for investments of this size and nature has been to use deferred accounting treatment through a Commission-approved regulatory asset. In its Petition,

²¹ See, May 17, 2019 letter to Hearing Examiner Kenton.

²² Prefiled Direct Testimony of James Jacoby at pg 18, lines 2 – 3. Prefiled Direct Testimony of Kristin McEvoy at pg 7, lines 11- 17.

²³ Prefiled Direct Testimony of Kristin McEvoy at pg 7, lines 1-10. Petition at ¶18.

Delmarva has requested Commission approval of one of two proposed mechanisms to mitigate regulatory lag: (1) temporary GCR-based alternative to the traditional regulatory asset-based approach²⁴ or (2) approval of a traditional regulatory asset.²⁵

1. The Temporary GCR-Based Regulatory Lag Mitigation Alternative is Permissible Under 26 Del.C. §303 (b)

Delmarva proposed the regulatory lag mitigation concept of temporary recovery through the GCR as a potential, albeit new, alternative to the traditional practice of Commission-approved regulatory assets for investments of this nature. The costs associated with interstate pipeline contracts are currently recovered through the GCR. The temporary GCR alternative proposal would include the annual cost for recovery for the Proposed Facility in the GCR on a temporary basis. At the time Delmarva files its first base rate case after the Proposed Facility is completed and closed to Plant in Service, Delmarva would then seek to recover the costs associated with the Proposed Facility in distribution rates and no longer obtain recovery of the costs through the GCR. Recovery pursuant to this alternative mechanism would avoid the need to establish a regulatory asset to defer the costs associated with the Proposed Facility.²⁶

At pages 3 – 4 of the Objection, Staff and DPA argue, incorrectly, that the Fuel Clause statute - 26 Del. C. § 303 (b) - does not permit temporary recovery for the costs of the Proposed Facility through the GCR mechanism. Section 303 (b) provides: “[t]he Commission shall require all utilities operating within its jurisdiction to produce evidence at a public hearing of the need for a change in the fuel adjustment....” Staff and DPA seek to convince the Hearing

²⁴ Petition at ¶ 19. Prefiled Direct testimony of Kristin McEvoy at pg 2, line 6 through pg 5, line 9.

²⁵ Petition at ¶¶ 18 and 20. Prefiled Direct testimony of Kristin McEvoy at pg 6, line 3 through pg 7, line 17.

²⁶ Prefiled Direct Testimony of Kristin McEvoy at pg 2, line 18 through pg 3, line 20.

Examiner that § 303 (b) is a restrictive statute and because it uses the word “fuel,” it prohibits putting into the GCR anything other than the cost of the natural gas itself (*i.e.*, only the cost of the gas molecules). Staff and DPA argue that the use of the word “fuel” in § 303 (b) must be interpreted to mean that the GCR is limited to the recovery of only “*combustible matter used to maintain fire, such as coal, wood, oil, or gas, in order to create heat or power.*”²⁷ Both Title 26 and actual Commission practice since 1976 prove the Staff/DPA argument to be incorrect.

A basic tenet of administrative law provides that the legislature may pass legislation and set policy but delegate broad enforcement authority to an administrative agency.²⁸ Accordingly, title 26 of the Delaware Code explicitly provides the Commission with broad jurisdiction and discretion to determine what the fuel clause rate (*i.e.*, the GCR) will consist of:

*The Commission shall have exclusive original supervision and regulation of all public utilities and also over their rates, property rights, equipment, facilities, service territories and franchises so far as may be necessary for the purpose of carrying out the provisions of this title. Such regulation shall include the regulation of the rates, terms and conditions. . . .*²⁹

Section 303 (b) provides: “[t]he Commission shall require all utilities operating within its jurisdiction to produce evidence at a public hearing of the need for a change in the fuel adjustment....” However, § 303 (b) does not instruct the Commission how to achieve that directive. Section 303(b) does not restrict “a change in fuel adjustment” to a change in the price of only the “*combustible matter used to maintain fire, such as coal, wood, oil, or gas, in order to create heat or power.*” Rather, Section 303 (b) directs the Commission to use a “fuel clause,”

²⁷ Objection at pg 4.

²⁸ *In re DNREC*, 401 A.2d 93, 95 (Del. Super. Ct. 1978) (“While the legislative power resides, in plenary form, in the General Assembly, as Article II, s 1 of the Delaware Constitution recites, it is recognized that the legislature may declare policy and announce legislative principles which shall apply in certain cases but delegate to an administrative body the authority to apply those principles in factual situations as they arise”)

²⁹ 26 Del. C. § 201 (a).

but delegates to the Commission the authority to apply the fuel clause directive through each utility's tariff.³⁰ In fact, that is exactly what the Commission has done.

Actual Commission GCR tariff practice since 1976 belies the Staff/DPA argument that only the cost of the fuel itself (*i.e.*, the “*combustible matter used to maintain fire, such as coal, wood, oil, or gas, in order to create heat or power*”) can be collected through the GCR. For decades, the annual GCR tariff has contained numerous cost components in addition to the cost of the fuel molecules. For example, among the costs collected through the GCR are (1) peak supply service contracts, (2) gas storage service costs, and (3) pressure support contract costs – the very services the Proposed Facility will provide.³¹ The Proposed Facility, if constructed, will provide Delmarva's natural gas customers with many of the services that, since 1976, have been paid for in the GCR. Simply put, the Proposed Facility constitutes a significantly less expensive (\$124 M less) and more reliable source for peak supply, storage and pressure support services that Delmarva currently obtains from out of state resources - all of which have been collected through the fuel clause/GCR pursuant to 26 *Del.C.* § 303 (b) and the GCR Tariff for decades. Staff/DPA's argument that the temporary GCR-based regulatory lag mitigation alternative would violate 26 *Del.C.* § 303 (b) is meritless.

2. The GCR Tariff Can be Modified to Allow for Necessary Adjustments in the 2021 GCR Docket.

At pages 4 through 6 of the Objection, Staff and DPA assert that Delmarva's temporary GCR-based regulatory lag mitigation alternative must be rejected because it is not permitted

³⁰ *In re DNREC*, 401 A.2d 93, 95 (Del. Super. Ct. 1978) (“While the legislative power resides, in plenary form, in the General Assembly, as Article II, s 1 of the Delaware Constitution recites, it is recognized that the legislature may declare policy and announce legislative principles which shall apply in certain cases but delegate to an administrative body the authority to apply those principles in factual situations as they arise”)

³¹ Delmarva's Petition at ¶ 9 and Direct Testimony of James B. Jacoby at pg 3, lines 16 – 17.

under the current language of Delmarva's natural gas tariff. As described above, the Proposed Facility constitutes a significantly less expensive and more reliable source for peak supply, storage and pressure support services that have been collected through the GCR and the GCR Tariff for decades. It is true that the *current* language of the GCR Tariff does not provide for a satellite LNG facility that will provide the same GCR services, that for decades, have been obtained through contracts with out of state resources. However, Staff and DPA fail to address the axiomatic fact that the Commission may – and will – adjust the language of utility tariffs where necessary. The prefiled testimony of Delmarva Witness McEvoy specifically provides that, should the Commission approve the GCR-based regulatory lag mitigation alternative, Delmarva's GCR tariff will need minor changes to allow for the temporary recovery through the GCR.³² The GCR tariff modification will not be required until the 2021 GCR docket. Should the Commission determine, in this docket, to approve Delmarva's alternative of temporary recovery through the GCR, modifications to the GCR tariff will be made in the annual 2021 GCR docket – not in this docket.

Finally, Delmarva proposed the regulatory lag mitigation concept of temporary recovery through the GCR in order to provide an option to consider, rather than proposing only the traditional practice of Commission-approved regulatory assets for investments of this nature. As described in the following section of this response, the established policy of this Commission is to approve regulatory assets to encourage utilities to incur costs that will result in significant benefits for customers. The Hearing Examiner and the Commission could find it preferable to

³² Prefiled Direct Testimony of Kristin McEvoy at pg 5, lines 3 through 9.

forgo the GCR-based alternative and, instead, focus on considering the more established alternative of a Commission-approved regulatory asset.

C. COMMISSION APPROVED REGULATORY ASSET

As an alternative to the proposed temporary GCR-based mechanism, Delmarva's Petition seeks the establishment of a regulatory asset. Regulatory assets have long been used by the Commission to mitigate regulatory lag for investments of this nature. In a recent order, the Commission explained that the creation of a regulatory asset is appropriate to give a utility "the possibility of being made whole if...it does something which is in the public interest."³³ Delmarva's ratepayers stand only to benefit from the LNG Facility, which will address natural gas supply shortfalls, improve natural gas delivery, and – most importantly – save ratepayers money. Staff and DPA's Objection levels a number of arguments which apply to costs that do *not* qualify for a regulatory asset. Not only are these points inapposite but, they ignore the serious natural gas shortages and delivery inefficiencies faced by Delmarva's ratepayers – a constituency which Staff and DPA are charged with protecting.

Delmarva's natural gas customer base has been steadily growing. This has occurred in tandem with major changes in weather patterns. As a result, Delmarva's ratepayers now face a natural gas peak supply shortfall. The Design Day Reserve Margin, which forecasts peak supply for the coldest day of the year, is currently at *negative* 5.3%. Similarly, because of the growing customer demand for natural gas, more pressure is required in Delmarva's distribution system to deliver gas to Delmarva's customers. The traditional method of meeting these growing demands has been through contracts with out-of-state interstate pipeline suppliers for both supply and

³³ *In re Artesian Water Co.*, P.S.C. Docket No. 16-1001, Order No. 9125 at p. 8 (Del. P.S. C. Oct. 31, 2017).

pressure support. That traditional approach poses no recovery risk or regulatory lag for Delmarva because the costs are passed through to customers as they are incurred through the GCR. In the event there is an under collection at the end of the GCR year, the under collection is trued-up with interest.

The problem with continuing that traditional approach is that it is expensive and must rely upon future out of state pipeline projects that may not necessarily come to fruition or do not offer the necessary firm supply. As explained in the testimony of James Jacoby, the rising costs of interstate pipeline contracts has been an issue of concern to Staff, DPA and the Commission itself.³⁴ Delmarva has proposed a reliable, Commission-regulated, cost effective and *local* solution: the Proposed Satellite LNG Facility. This is a major investment in Delmarva's infrastructure made for the public good. The LNG Facility is a prime candidate for regulatory asset treatment.

In October 2017, this Commission clarified the standard for regulatory assets. Artesian Water Company ("Artesian") sought regulatory asset treatment for the litigation costs of defending against a real estate developer's claim that Artesian – and, ultimately, its ratepayers – should bear \$459,000 worth of contribution-in-aid-of-construction ("CIAC") costs.³⁵ Artesian incurred approximately \$200,000 in legal fees successfully defeating the developer's claim.³⁶ The Commission held that Artesian's litigation fees qualified for inclusion in a regulatory asset because they were incurred for the "public interest" – there, saving the ratepayers from nearly half a million dollars in CIAC costs.³⁷ This reasoning was based on the policy that the Commission should

³⁴ Prefiled Direct Testimony of James Jacoby at pg 5, lines 3 through pg 6, line 9.

³⁵ *Artesian*, Order No. 9125 at p. 1.

³⁶ *Id.* at p. 2.

³⁷ *Id.* at p. 7.

“incentivize” utilities to make investments for the good of the public by providing them the possibility of recovering their investment in the next rate proceeding.³⁸ The same policy applies to the Proposed Facility.

As explained above, Delmarva’s ratepayers face a shortage in gas supply and pressure in the delivery system. Delmarva must take action by either (a) continuing the traditional long-accepted approach of entering into expensive interstate pipeline contracts for supply and pressure support or (b) constructing the Proposed Facility. The Proposed Facility will be more reliable and cost effective than the current practice. If Delmarva continues to rely upon interstate pipeline contracts for supply and pressure support, this is expected to cost \$399 million over the next 30 years. By contrast, the cost of construction, operation and maintenance of the LNG Facility for the same 30 year period is \$275 million, providing savings of \$124 million for customers. Like Staff argued in the *Artesian* case, “but for” the proposed LNG Facility, Delmarva’s ratepayers would be worse off.³⁹ Customers would pay an estimated \$124 million more for supply and pressure that is less reliable because it is subject to the risk of service interruptions from transportation over hundreds of miles of interstate pipelines.⁴⁰ The LNG Facility would be a *local* source of supply and pressure that costs less. Under this Commission’s policy, Delmarva should be incentivized to make investments in infrastructure, like the LNG Facility, which benefit the public good. Creating a regulatory asset will serve as an appropriate incentive because Delmarva will be able to defer certain O&M costs and earn a return, with the possibility of recovering the cost of constructing and operating the Proposed Facility in the future. Without this type of

³⁸ *Id.* at pp. 7-8.

³⁹ Order No. 9125 at p. 5.

⁴⁰ Prefiled Direct Testimony of Jeff Miles at pg 6, lines 1 – 6.

incentive and protection from regulatory lag, utilities would be significantly disincentivized from making investments like the LNG Facility, due to the considerable lag between expenditure and recovery in the next rate case.

The Joint Objection ignores the Commission's regulatory asset standard (which Staff argued *for* in *Artesian*) and dismisses the benefit of the LNG facility to Delmarva's ratepayers as mere projection. Staff and DPA first argue that the LNG Facility costs should not be included in rate base because the facility has not been built yet and is not used and useful plant. But Delmarva does not *currently* seek to include the LNG Facility costs in rate base. Delmarva asks to defer the inclusion of the costs in rate base to a future rate proceeding through a regulatory asset, which is the point of a regulatory asset. The used and useful analysis applies to costs that a utility wants to recover now – not to those it defers to a future rate case through use of a regulatory asset. For similar reasons, the comparison to CWIP is inapt. Delmarva is not asking to recover construction costs now.

Instead, Delmarva seeks to make a significant investment in its natural gas infrastructure to benefit ratepayers. Major proposed investments for the public good are not analyzed under the used and useful standard or the standard for CWIP. They are analyzed to determine whether they should receive regulatory asset treatment to offset regulatory lag, while the costs are being incurred – so that utilities are incentivized to make these large investments. Although Staff and DPA suggest that the benefit to ratepayers from the LNG facility is mere projection, there is absolutely no evidence to support this suggestion. The current briefing is akin to a motion for summary judgment, so Staff and DPA cannot rely on conclusory assertions that lack evidentiary support. Staff and DPA have offered no evidence challenging Delmarva's calculations of expenses and cost savings for customers – and they have specifically agreed that no further testimony or evidence is

required in this docket.⁴¹ The only evidence in the record supports Delmarva's conclusion that the LNG Facility will benefit ratepayers through reduced costs, improved reliability, and solving the supply and pressure shortfalls.

Staff and DPA also distort the regulatory asset standard by claiming that if the Commission approves a regulatory asset, it will prevent or restrict review of the LNG Facility expenses in a rate proceeding. This is based on an interpretation of FASB 71 that this Commission has already rejected. Staff and DPA argue that if the Commission creates a regulatory asset for the LNG Facility, then it will be creating a presumption that the LNG Facility expenses should be included in rate base in Delmarva's next rate case. In the same *Artesian* case in which the Commission clarified the regulatory asset standard, the Commission explained that approval of regulatory assets should be consistent with FASB 71 "insofar as it would indicate a probability of recovery *without prejudging* the appropriateness of cost recovery for the particular issue underlying the application."⁴² The Commission does not tie its hands by approving a regulatory asset. The merits of recovery are explicitly not decided by approval of a regulatory asset. A decision on the merits is deferred while incentivizing current investment for the public good. Staff and DPA's Objection, if granted, would serve to stand in the way of projects that will benefit the public. This would harm, rather than benefit customers.

The Commission's decision in the *Artesian* case is consistent with its established practice of approving regulatory assets in instances where Delmarva Power seeks to make investments designed to bring significant benefits to its customers. For example:

- In September 2008, the Commission approved a regulatory asset for Delmarva's investment in Advanced Metering Infrastructure (AMI). AMI involved the replacement

⁴¹ Letter to Glenn C. Kenton, Esquire dated May 17, 2019. Revised Order No. 9388 in this Docket.

⁴² *Artesian*, Order No. 9125 at p. 8 (emphasis added).

of all of Delmarva's electric meters with "Smart Meters" that are read remotely from Delmarva's offices and record usage information every 15 minutes. The AMI meters eliminated \$4M in meter reading costs per year and enabled Delmarva to introduce many other programs for energy conservation and customer savings.⁴³

- In January 2012, the Commission approved a regulatory asset for Delmarva Power's investment in Dynamic Pricing. Dynamic Pricing is a program that allows Delmarva to notify electric customers when they can voluntarily reduce their energy use during specific peak periods when the regional electric grid is becoming stressed and electricity prices are at their highest (normally a few of the hottest summer days each year). The AMI meters will know if each individual customer did in fact reduce their usage during the specific time frame and customers that do so receive a bill credit.⁴⁴
- In December 2012, the Commission approved a regulatory asset for Delmarva Power's investment in Direct Load Control, a voluntary program through which customers allow Delmarva to install a switch on their central AC compressor and agree that during the 1 or 2 days a year when the grid is at peak load, the switch will automatically cycle their AC compressor off for short periods of time to reduce the load on the grid. Customers receive bill credits for participating in the Direct Load Control program.⁴⁵
- In April 2014, the Commission approved a regulatory asset for cost incurred by Delmarva to make various "bill transparency" modifications to its billing system. The billing system modifications made more detailed information available on Delmarva's bills concerning what customers pay for legislatively-mandated surcharges on their electric bill (REC's, SRECs, Green Energy Fund, Qualified Fuel Cells). The Commission approved regulatory asset covered the programming costs Delmarva Power incurred in making the billing system changes.⁴⁶

In order to operate successfully, utilities must be able to rely of precedent set by the Commission. As described above, the established precedent of the Commission is to approve regulatory assets in instances where a utility seeks to make substantial investments for the purpose of bringing significant benefits to its customers. The *Artesian* decision from 2017 served to further enforce this Commission's precedent.⁴⁷ Now, in this docket, Staff and DPA

⁴³ Order No. 7420 in Docket No. 0728, September 16, 2008.

⁴⁴ Order No. 8105 in Docket No. 09-311, January 31, 2012.

⁴⁵ Order No. 8253 in Docket No. 11-330, December 18, 2012.

⁴⁶ Order No. 8556 in Docket No. 13-250, April 29, 2014.

⁴⁷ Order No. 9125.

seek to convince the Hearing Examiner that a regulatory asset should not be approved – an argument that cuts directly against established Commission precedent. Staff has gone so far as to assert: “*there is no legal authority to grant ... a Regulatory Asset.*”⁴⁸ That assertion is both incorrect and entirely inconsistent with Staff’s position in the recent *Artesian* case itself, in which Staff not only supported approval of a regulatory asset for Artesian, but when approval of an asset was originally denied, Staff itself filed a petition for Reconsideration.⁴⁹ The Commission approved the regulatory asset in *Artesian* based upon the arguments of Staff.⁵⁰ The inconsistent application of Commission precedent promoted by Staff and DPA to a project as important as the Proposed Facility would be damaging to all regulated utilities and their customers.

⁴⁸ Correspondence from Thomas D. Walsh to Hearing Examiner Kenton (May 23, 2019, at 3:51 PM).

⁴⁹ Order No. 9125 at page 2 (“*the Commission’s Staff (“Staff”) recommended that the Commission grant Artesian’s petition*”) and at page 3 (“*Staff filed a Petition for Rehearing and Reconsideration of the Commission’s denial of Artesian’s Request to Establish a Regulatory Asset.*”).

⁵⁰ *Id.* at page 8, ¶4.

III. Conclusion

At base, the Commission will decide at an appropriate future date if the costs and expenses of the Proposed LNG Facility are properly recoverable. Delmarva should be incentivized to make that large investment now through Commission approval of a regulatory asset to make it possible that if the LNG Facility costs are recoverable, Delmarva will not be harmed by regulatory lag between expenditure and recovery. Accordingly, Delmarva requests that the Hearing Examiner recommend that the Commission either (a) approve a regulatory asset, or (b) approve the proposed temporary GCR-based regulatory lag mitigation mechanism.

Respectfully Submitted:



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Dated: May, 30, 2019

Certificate of Service

The undersigned certifies that on May 30, 2019, the foregoing was served on the parties of record to this docket via DelaFile and by electronic mail.

A handwritten signature, possibly reading "JH", is written above a horizontal line.

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Docket Details

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 FOR REVIEW AND APPROVAL OF ITS PROPOSAL TO CONSTRUCT A SATELLITE
 NATURAL GAS STORAGE FACILITY

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